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SJC-13088

H1 LINCOLN, INC.<sup>1</sup> vs. SOUTH WASHINGTON STREET, LLC, & others.<sup>2</sup>

Hampden. October 4, 2021. - January 24, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

Consumer Protection Act, Landlord and tenant, Lease, Exemption from liability, Unfair or deceptive act, Damages. Contract, Lease of real estate, Release from liability, Misrepresentation, Damages. Landlord and Tenant, Consumer protection, Termination of lease, Multiple damages. Damages, Consumer protection case. Fraud. Extortion.

Civil action commenced in the Superior Court Department on December 27, 2017.

The case was tried before Mark D. Mason, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Robert J. Cordy (Annabel Rodriguez also present) for the defendants.

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<sup>1</sup> Doing business as Majestic Honda.

<sup>2</sup> 849 South Washington Street, LLC; 849 South Washington Street Realty Trust; 855 South Washington Street Realty Trust; 865 South Washington Street Realty Trust; and Cooper Avenue Realty Trust.

John J. Egan (Michael G. McDonough also present) for the plaintiff.

The following submitted briefs for amici curiae:

Daniel A. Ford for Retailers Association of Massachusetts, Inc.

Michael C. Gilleran for National Retail Tenants Association.

David J. Hatem & Patricia B. Gary for American Council of Engineering Companies of Massachusetts & another.

KAFKER, J. The primary issue presented in this case is the enforceability of contractual provisions limiting liability for violations of G. L. c. 93A, § 11, which makes "unfair or deceptive act[s] or practice[s]" between businesses unlawful. We conclude that limitation of liability provisions will not be enforced to protect defendants who willfully or knowingly engage in the unfair or deceptive conduct prohibited by the statute.

The case concerns a bitter and protracted dispute over a commercial lease. The plaintiff, H1 Lincoln, Inc., doing business as Majestic Honda (Majestic), is a car dealership whose principal is James Balise. The defendants are various entities connected with Alfredo Dos Anjos -- specifically, two LLCs of which he is the principal, South Washington Street, LLC, and 849 South Washington Street, LLC (collectively, Dos Anjos LLCs or LLCs); and four realty trusts of which he is the trustee, 849 South Washington Street Realty Trust, 855 South Washington Street Realty Trust, 865 South Washington Street Realty Trust, and Cooper Avenue Realty Trust (collectively, Dos Anjos realty

trusts). Majestic agreed to rent the property at issue from the Dos Anjos LLCs, with plans to develop and operate an automobile dealership facility there.

When the Dos Anjos LLCs sought to terminate the lease, Majestic commenced this action against them in the Superior Court, alleging unfair and deceptive conduct in violation of G. L. c. 93A, § 11, among other claims. Following a jury-waived trial, the judge found for Majestic on its c. 93A, § 11, claim and granted specific performance coupled with delay damages. Because the judge also found that the Dos Anjos LLCs' violations of the statute were "willful or knowing," he doubled the damages. After Majestic encountered further obstructive behavior from the defendants in its efforts to enforce the lease agreement, it moved for additional damages, alleging renewed violations of G. L. c. 93A, § 11. The judge reopened the trial, where Majestic again prevailed and was awarded additional delay damages, which the trial judge again doubled for "willful or knowing" violations.

The defendants make two central contentions on appeal. First, they argue that in both the initial trial and the reopened trial, the trial judge erred in finding for Majestic on its c. 93A, § 11, claims, because at no time was the conduct of the defendant entities sufficient, as a matter of law, to violate the statute. Second, the defendants maintain that even

if their conduct was unlawful under G. L. c. 93A, § 11, Majestic is barred from recovering delay damages because, under a limitation of liability provision in the lease, it waived its claims to be compensated "for any speculative or consequential damages."

We conclude that the defendants' conduct -- which included fraudulent misrepresentations and pretextual contractual objections designed to string along the plaintiffs and coerce additional concessions to which the defendants were not entitled under the lease -- meets the standard for unfair or deceptive acts or practices under G. L. c. 93A, § 11. Furthermore, the unfair or deceptive conduct was done willfully, warranting the double damages awarded by the trial judge. Finally, we conclude that a limitation of liability provision provides no protection in a c. 93A, § 11, action where, as here, the violation of the statute was done willfully or knowingly.<sup>3</sup>

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<sup>3</sup> We acknowledge the amicus briefs filed by the National Retail Tenants Association; the Retailers Association of Massachusetts, Inc.; and the American Council of Engineering Companies of Massachusetts and the Massachusetts Chapter of the American Institute of Architects.

As required by Mass. R. A. P. 17 (c) (5) (B), as appearing in 481 Mass. 1635 (2019), counsel for the National Retail Tenants Association disclosed that the plaintiff made a monetary contribution to fund the preparation and submission of the amicus's brief. Counsel for the Retailers Association of Massachusetts, Inc., similarly disclosed under rule 17 (c) (5) (C) that its brief had been funded in part by Balise Management,

Background. 1. The lease agreement. On October 28, 2016, Majestic and the Dos Anjos LLCs executed a written lease by which Majestic agreed to rent two adjacent parcels at 849 and 865 South Washington Street, North Attleborough (leased premises), for an initial twenty-three year term. Near the leased premises sits another parcel owned by Dos Anjos that he leases to CarMax, a used car dealership. South Washington Street is a desirable location to situate a car dealership; indeed, it is dubbed "Auto Road" in reference to the numerous car dealerships located in the vicinity. The leased premises

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LLC, an entity affiliated with the plaintiff. Based on these disclosures, the defendants moved to strike the briefs from the record. In response, the amici pointed out not only that they had made the disclosures in compliance with the requirements of rule 17 (c) (5), but also that no counsel for a party had authored their briefs in whole or part, which they claimed was enough to satisfy the admonition of this court that "[b]riefs of amicus curiae are intended to represent the views of nonparties; they are not intended as vehicles for parties or their counsel to make additional arguments beyond those that fit within the page constraints of their briefs." Aspinall v. Philip Morris Cos., 442 Mass. 381, 385 n.8 (2004).

While Mass. R. A. P. 17 (c) (5) (B) & (C) require an amicus curiae to disclose an external monetary contribution that it has received in support of the preparation or submission of its brief -- whether from a party, party's counsel, or otherwise -- we have not yet ruled on the question of the consequences, if any, that attach to such funding. We need not do so here, as we did not rely on the challenged amicus briefs in this case to reach our decision. We do, however, refer the question to our standing advisory committee on the Rules of Appellate Procedure for further consideration.

are zoned for the development and operation of new and used automobile dealerships.

In addition to naming the Dos Anjos LLCs as the landlords, the lease also represented that the LLCs had a "fee simple interest" in the leased premises and specifically covenanted and warranted that "no third party," other than governmental authorities, had legal rights to control the use and development of the leased premises. The lease further provided that if the LLCs' representations, covenants, and warranties were untrue or incorrect, Majestic was entitled to remedies "at law, in equity, or under the terms of [the] Lease."

Majestic's plan for the leased premises, as expressly recognized in the lease, was to demolish the two buildings on the premises and replace them with a Honda dealership facility. The lease also provided that during an initial feasibility period, Majestic was to give the Dos Anjos LLCs notice of any planned demolition and new construction, including preliminary site plans of the proposed development. The LLCs then had the right, within fifteen days after receiving such notice, to terminate the lease if they "reasonably" objected to the planned development. However, if the LLCs did not send a written termination notice within this fifteen-day period, then their right to terminate the lease would be deemed waived.

With respect to the permitting process for Majestic's planned development, the lease provided that the Dos Anjos LLCs was obliged to "cooperate" with Majestic in obtaining any governmental permits and authorizations required to modify the leased premises for its planned uses, although any applications for zoning changes or special use permits required the LLCs' consent. The lease further provided, however, that this consent "shall not be unreasonably withheld."

The lease included terms specifying the scope of Majestic's remedies upon default by the Dos Anjos LLCs. If the LLCs "fail[ed] to perform any nonmonetary obligation," Majestic could pursue "any and all other remedies which it may have at law and/or in equity," including "su[ing] for damages." Crucially, however, the lease also contained a limitation of liability provision that immunized the LLCs from "any speculative or consequential damages caused by the Landlord's failure to perform its obligations under [the] Lease."

2. Balise's purchase of an adjacent parcel from the Cash family. Abutting the leased premises is a parcel that was owned by the Cash family (Cash land) at the time that the lease was executed. Dos Anjos had been trying to buy the Cash land for fifteen years. In late 2016 and early 2017, both Dos Anjos and Balise negotiated with the Cash family to buy the Cash land, each separately making \$800,000 offers. The Cash family

accepted Balise's offer in January 2017, thus upsetting Dos Anjos's long-held design to acquire the Cash land.

3. Majestic's initial discovery of the ownership discrepancy. After the lease was executed, Majestic began the permit application process. As part of this process, it was discovered in 2016 or 2017, through a title search, that there was a discrepancy between the entities listed as landlords in the lease and the record title holders of the leased premises; while the Dos Anjos LLCs were represented in the lease as the landlords and fee simple owners of the leased premises, record title was with the Dos Anjos realty trusts. Based on Balise's experience in car dealership development, he viewed this discrepancy at the time as an issue that could be subsequently worked out as a matter of legal "clean up."

4. Majestic's site plan and Dos Anjos's decision to terminate the lease. In May 2017, Majestic submitted a concept site plan to the Dos Anjos LLCs, which indicated its intentions to demolish one of the existing buildings on the leased premises and replace it with a new building, and to renovate the other existing building. The site plan also showed an intended use of the Cash land as a facility where inventory and display vehicles would be parked. The trial judge determined that, upon

reviewing this site plan, Dos Anjos became aware that Balise had acquired the Cash land.<sup>4</sup>

After receiving notice of Majestic's plans for demolition and construction, the Dos Anjos LLCs did not express any objection or intent to terminate the lease within fifteen days. The LLCs therefore waived their right to terminate the lease based on objections to proposed demolition or construction on the leased premises. Indeed, Dos Anjos was unresponsive to the many attempts by Balise to contact him to discuss the May 2017 site plan.

On July 25, 2017, Majestic resubmitted the site plan, accompanied by a suggestion that Dos Anjos and Balise meet to conduct a site walk and to discuss the resubmitted site plan. Dos Anjos did not respond, despite repeated suggestions by his lawyer, David Manoogian, that a site walk would be beneficial.

On July 28, 2017, Dos Anjos began to express misgivings to Manoogian about Majestic's site plan, citing as his reason concerns about having two buildings on the leased premises. Manoogian advised that this objection would not be a sufficient reason to reject the site plan, because the lease expressly recognized Majestic's intention to demolish and replace the two existing buildings.

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<sup>4</sup> The trial judge did not credit Dos Anjos's testimony that he did not recognize the Cash land on the site plan.

On August 4, 2017, Dos Anjos finally responded to Majestic's proposal of a site walk, indicating that a site visit would be unnecessary if Majestic would agree to amend the lease to limit its use of the leased premises to a Honda dealership only. This Honda exclusivity limitation was not required under the original lease terms. Seeking to secure approval for its site plan, Majestic agreed to this concession.

Nevertheless, Dos Anjos continued to express unhappiness about Majestic's intention to operate two buildings on the leased premises, telling Manoogian that he wished to terminate the lease unless Majestic changed its plan. Manoogian again advised Dos Anjos that this "two buildings" objection would not provide a sufficient basis under the lease for rejecting the site plan and terminating the lease. Accordingly, Manoogian prepared a termination letter stating three other objections that he believed would better comport with the lease terms: first, that the site plan covered land -- the Cash land -- not owned or controlled by the Dos Anjos LLCs that would likely be part of a special permit application; second, that the plan contemplated merging the parcels that comprised the leased premises; third, that the plan would require the LLCs to grant easements to allow common use between the parcels of any planned access drives and utility systems.

The termination letter was mailed to Majestic on August 9, 2017. Having received the termination letter, Balise sent an e-mail message to Dos Anjos on August 11, 2017, seeking a personal meeting to resolve any issues underlying the latter's decision to terminate the lease. In response to Balise's message, Dos Anjos offered to reinstate the lease if, in addition to maintaining the Honda exclusivity limitation, Balise would agree to the immediate sale of the Cash land to one of the Dos Anjos LLCs for one dollar, in exchange for which the leased premises would be expanded to include the Cash land for no extra rent. There was nothing in the lease requiring transfer of the Cash land, especially transfer of a property purchased for \$800,000 for one dollar. Dos Anjos subsequently testified that at this point and thereafter, he was "fishing for a deal."

On September 7, 2017, Majestic indicated by e-mail that it would accept Dos Anjos's terms for reinstating the lease. Manoogian accordingly sent Majestic a lease reinstatement agreement for approval. He nevertheless cautioned that Dos Anjos had "not yet decided to sign the lease reinstatement agreement" and was "still considering the matter."

Over two months later, on November 22, 2017, the Dos Anjos LLCs sent Majestic a letter confirming their earlier decision to Majestic commenced this action against them the next day.

5. The jury trial and first c. 93A bench trial. Majestic alleged common-law claims for breach of contract and breach of the implied covenant of good faith and fair dealing, as well as violations of G. L. c. 93A, § 11. In a jury trial on Majestic's common-law claims, the jury found that the Dos Anjos LLCs had committed a breach of the lease and of the implied covenant. Majestic's c. 93A, § 11, claim was reserved for a jury-waived trial conducted on October 26, 2018.

In the bench trial, the judge concluded that the Dos Anjos LLCs were liable for several violations of G. L. c. 93A, § 11. First, the judge found that the LLCs knowingly disregarded their contractual obligations by terminating the lease. Specifically, the judge determined that the reasons given for terminating the lease were unreasonable and invalid under the lease. Indeed, he found that the LLCs' stated reasons were mere pretexts concealing what really motivated the termination, which was Dos Anjos's bitterness over Balise's purchase of the Cash land.<sup>5</sup>

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<sup>5</sup> While the trial judge was unpersuaded by Dos Anjos's testimony that he did not notice the Cash land on the concept site plan that Majestic submitted for approval in May 2017, he placed great weight on Dos Anjos's subsequent remark that, had he discovered that the Cash land was part of Majestic's site plan in May, he "would have cancelled the deal right then and there." The judge took this to reveal that the lease termination was ultimately motivated by Dos Anjos's bitterness that Balise had thwarted his hopes of acquiring the Cash land.

Second, the trial judge found that the Dos Anjos LLCs used the threat of withholding approval for the site plan and of terminating the lease to coerce Majestic into granting them benefits they were not entitled to under the lease, in particular the Honda exclusivity limitation and the option to purchase the Cash land for one dollar. The judge also interpreted the LLCs' conduct surrounding the lease termination as a tactic to string Majestic along to extort unwarranted benefits.

Accordingly, the judge ruled that Majestic was entitled to "actual damages" under G. L. c. 93A, § 11, awarding \$4,462,500 in delay damages should Majestic elect specific performance, or \$5,150,000 for the value of the foregone car dealership should it choose to walk away from the lease.<sup>6</sup> The sum of delay damages was calculated by determining that each month of delay in operating its planned dealership cost Majestic losses of \$175,000, then multiplying that amount by 25.5 to reflect the 21.5 months of delay the LLCs' unlawful conduct had caused

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<sup>6</sup> Although the jury had awarded Majestic damages on its common-law claims, the judge limited recovery to the c. 93A damages to prevent duplicative damages. "Where injury is incurred because of conduct which comprises the elements of any common law . . . cause of action, and which is also a violation of [G. L. c. 93A], recovery of cumulative damages under multiple counts may not be allowed." Calimlim v. Foreign Car Ctr., Inc., 392 Mass. 228, 235 (1984). Rather, "one recovery is precluded, with preference given to retaining the c. 93A award." Costa v. Brait Bldrs. Corp., 463 Mass. 65, 73 (2012).

Majestic by the time of the jury trial, plus four months of delay from the date of the jury verdict to the judge's ruling in the bench trial.

The trial judge doubled these actual damages under the multiple damages provision of G. L. c. 93A, § 11, which authorizes double or treble damages if the defendant's unlawful conduct was "willful or knowing." The judge supported his award of double damages by multiple findings that the Dos Anjos LLCs had engaged in unfair and deceptive conduct willfully or knowingly. Specifically, he found that the LLCs knowingly gave pretextual reasons to terminate the lease and used the lease termination as leverage to coerce concessions from Majestic. Further, he found that the LLCs willfully and knowingly strung Majestic along, again as a means to extract undeserved benefits.

The trial judge's award of double damages brought Majestic's total recovery to \$10,300,000 if it chose not to enforce the lease, or \$8,925,000 if it elected specific performance. The judge also ruled that the limitation of liability provision in the lease was unenforceable as to the Dos Anjos LLCs' c. 93A, § 11, violations, because these violations "sound[ed] in tort" rather than in breach of contract.

In his order of January 28, 2019, entering judgment for Majestic on its c. 93A claim, the judge ruled that should Majestic elect specific performance, the Dos Anjos LLCs were to

"cooperate" with Majestic in connection with the permitting process.

6. Majestic's enforcement of the lease. On February 12, 2019, Majestic elected specific performance. The following day, Majestic sent the Dos Anjos LLCs a letter asking for immediate access to the leased premises. The LLCs failed to respond to Majestic's letter. Only after being repeatedly pressed for an answer did the LLCs eventually confirm that the land delivery date -- the date by which, under the lease, the site would have to be vacated -- would be scheduled for April 1, 2019.

Majestic also restarted the permit application process. While drafting applications for permits that required listing the actual owner -- as distinct from the record title holder<sup>7</sup> -- of the leased premises, Majestic's permitting attorneys and consultant became confused about which entities to list as the owners of the leased premises. Majestic was aware from the title search conducted during its initial permit application process that the Dos Anjos realty trusts were the record title holders. However, the permitting attorneys were unsure whether the trusts were also the actual owners, or whether title had been transferred by an unrecorded deed to the Dos Anjos LLCs

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<sup>7</sup> The record title holder can diverge from the actual owner because the record title holder may have subsequently transferred the property but failed to record the deed.

such that the LLCs were now the owners of the leased premises, as represented and warranted in the lease and as Dos Anjos and his agents had represented in pleadings, affidavits, sworn testimony, and judicial admissions during the prior litigation with Majestic and in subsequent motions -- representations on which, the trial judge found, Majestic reasonably relied. In fact, the Dos Anjos realty trusts held both record and actual title to the leased premises.

During this period, the defendants did nothing to correct their misrepresentations as to the ownership of the leased premises. For example, when Majestic sent draft permit applications to Dos Anjos for signature listing the LLCs as the owners of the leased premises, the defendants returned the signed applications without notifying Majestic that the leased premises were in fact owned by the realty trusts. As the trial judge found, because Majestic reasonably but mistakenly believed that the Dos Anjos LLCs were the actual owners of the leased premises and therefore listed them as such on its permit applications, Majestic's applications at this time were invalid, causing months of delay in the permitting process. For example, Majestic was unable to obtain a building permit until September 16, 2019.

In late May 2019, Majestic discovered through a new title search that record title to the leased premises was still with

the Dos Anjos realty trusts, even after the April 1 land delivery date by which, under the lease, the landlord's warranties and covenants had to be made true and accurate. On May 31, 2019, Majestic notified Dos Anjos's lawyers by e-mail that record title to the leased premises was at odds with what Dos Anjos and his agents had repeatedly represented and what was guaranteed in the lease. Majestic proposed that, to resolve the discrepancy, title to the leased premises be transferred from the trusts to the LLCs.

On June 13, 2019, Dos Anjos's counsel sent an e-mail message to Majestic proposing, as an alternative to transferring ownership of the leased premises to the LLCs, an attornment or subordination agreement under which two of the Dos Anjos realty trusts would recognize the lease and Majestic's rights under it. Majestic rejected this offer of attornment, insisting that fee simple title to the leased premises must be placed in the Dos Anjos LLCs as guaranteed in the lease. The defendants, however, refused to transfer title.

The failure of negotiations on the ownership issue led Majestic to move for additional delay damages under Mass. R. Civ. P. 60, 365 Mass. 828 (1974), alleging further c. 93A, § 11, violations. At an August 15, 2019 hearing on the rule 60 motion, the Dos Anjos LLCs admitted that they did not own the leased premises and that both record title and true ownership

were in the Dos Anjos realty trusts. By stipulation among the parties, the trusts were then added nunc pro tunc as defendants to Majestic's original complaint. Following the hearing, the motion judge issued orders reopening the c. 93A trial and requiring the Dos Anjos realty trusts to be added as landlords under the lease.

Even after the rule 60 hearing, however, the defendants persisted in their obstruction, this time by refusing to cooperate with Majestic in its permit applications, prompting the judge to issue a further order on September 10, 2019, commanding the defendants to cooperate with Majestic in completing outstanding permit applications. Despite this admonition, the defendants only returned the final permit application that Majestic needed on November 16, 2019.

7. The reopened c. 93A trial. Majestic's additional c. 93A claim was tried to a judge over two days in October and December 2019. The trial judge ruled that the defendants had engaged in further misconduct violative of G. L. c. 93A, § 11.

First, the judge found, the defendants knowingly disregarded their obligations under the lease by providing a false warranty of title and failing to make that warranty true and accurate as of the land delivery date, and by multiple failures to cooperate with Majestic in the permitting process. Second, the defendants deceived Majestic as to the ownership of

the leased premises by repeated misrepresentations in the lease, court filings, and judicial admissions. Third, by refusing to transfer title to the leased premises to bring the property's ownership into conformity with the lease's warranty of title after deceiving Majestic about the leased premises' ownership for months, the defendants were leveraging the ownership issue and stringing Majestic along in an attempt to coerce Majestic into agreeing to an attornment. An attornment would have been a benefit outside the lease, the judge found, because an attornment would shield the property interest in the leased premises from judgment liens should the LLCs default.<sup>8</sup>

The trial judge also concluded that the defendants had engaged in these c. 93A, § 11, violations willfully and knowingly. He reached this conclusion based on his findings that the defendants had willfully and knowingly used the ownership discrepancy as leverage to extract concessions from Majestic and had willfully and knowingly strung Majestic along. He also relied on his finding that the defendants had defied his January 28, 2019 order. The judge's conclusion was bolstered by adverse inferences he drew from the fact that all three witnesses associated with the defendants -- Dos Anjos, Manoogian, and Dos Anjos's daughter and agent, Lisa Pariseault

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<sup>8</sup> Under the lease, judgments against the landlord constitute liens against the landlord's interest in the leased premises.

-- declined to respond to any questions beyond identifying themselves by invoking constitutional privileges against self-incrimination based on the judge's indication during the rule 60 motion hearing that he would consider referring Dos Anjos, Pariseault, and their lawyers to appropriate law enforcement agencies for potential perjury charges. Among the adverse inferences the judge drew was that although the defendants knew all along that the leased premises were owned by the Dos Anjos realty trusts, not the Dos Anjos LLCs, they "intentionally deceived" Majestic about the true ownership of the leased premises, thereby delaying and sabotaging Majestic's municipal permitting, as a way to gain leverage over Majestic in hopes of obtaining unwarranted concessions from it.

The defendants' c. 93A, § 11, violations, the trial judge determined, caused delays in Majestic's municipal permitting process stretching from February 2019, when it elected specific performance, to November 16, 2019, when the defendants returned the final signed permit application that Majestic needed. Adopting the rate of \$175,000 per month of delay established in the initial c. 93A trial, the judge calculated that Majestic was entitled to a total of \$1,592,250 in additional delay damages for over nine months of added delays. Because the defendants' unfair and deceptive conduct was willful and knowing, the judge doubled these actual damages, for a total additional award of

\$3,184,500. The judge also ruled, based on the same distinction he drew in the initial trial between c. 93A, § 11, claims sounding mostly in tort versus those sounding in breach of contract, that the limitation of liability provision in the lease did not preclude recovery for Majestic.

Discussion. 1. Standard of review. Where a judge makes findings of fact in a bench trial, we review them for clear error. Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 302 (2009), citing Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). A trial judge's finding is clearly erroneous only when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 509 (1997), S.C., 428 Mass. 543 (1998), and S.C., 432 Mass. 43 (2000), quoting Building Inspector of Lancaster v. Sanderson, 372 Mass. 157, 160 (1977). The trial judge's legal conclusions, by contrast, we review de novo. T.W. Nickerson, Inc. v. Fleet Nat'l Bank, 456 Mass. 562, 569 (2010).

In an action alleging violations of G. L. c. 93A, "whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact." Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 503 (2011), quoting Schwanbeck v. Federal-Mogul Corp., 31 Mass. App. Ct. 390, 414 (1991), S.C.,

412 Mass. 703 (1992). But whether conduct found to be unfair or deceptive "rises to the level of a chapter 93A violation is a question of law" (citation omitted). Baker v. Goldman, Sachs & Co., 771 F.3d 37, 49 (1st Cir. 2014). Accord Casavant, supra ("A ruling that conduct violates G. L. c. 93A is a legal, not a factual, determination" [citation omitted]).

2. Chapter 93A, § 11, liability for the defendants' conduct surrounding the lease termination. We first consider whether the trial judge properly concluded that the Dos Anjos LLCs' actions surrounding the termination of their lease with Majestic amounted to unfair and deceptive conduct prohibited under G. L. c. 93A, § 11, and whether any such unlawful conduct was "willful or knowing."

General Laws c. 93A, § 2, makes unlawful "unfair or deceptive acts or practices" in the conduct of "any trade or commerce," while § 11 applies these prohibitions to dealings between those "engaged in trade or commerce," giving a private right of action to businesses harmed by another business's unlawful conduct under § 2. Chapter 93A also provides for the doubling or tripling of "actual" damages if the court finds that the defendant's unfair or deceptive conduct was a "willful or knowing" violation of the statute. G. L. c. 93A, § 11, fifth par.

a. The defendants' liability for unfair conduct. To determine what conduct rises to the level of an "unfair" act or practice actionable under G. L. c. 93A, we have consistently looked to the factors articulated in PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975): (1) whether the conduct is within "at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers" or other businesses (citation omitted).

Focusing on the first PMP Assocs., Inc. factor, we conclude that the Dos Anjos LLCs' conduct surrounding the lease termination was squarely within an established category of unfair conduct under G. L. c. 93A, § 11, namely, "commercial extortion." Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 474 (1991).<sup>9</sup> This is the use of "coercive or extortionate tactics" by one business to "extract undeserved concessions from other business entities." Renovator's Supply, Inc. v. Sovereign

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<sup>9</sup> Our application of the PMP Assocs., Inc. factors is sensitive to the business-to-business context of G. L. c. 93A, § 11, which requires a higher degree of misconduct for a violation than in the consumer protection context of G. L. c. 93A, § 9. See Giuffrida v. High Country Investor, Inc., 73 Mass. App. Ct. 225, 238 (2008) ("[B]usinesses seeking relief under Section 11 are held to a stricter standard than consumers in terms of what constitutes unfair or deceptive conduct" [citation omitted]).

Bank, 72 Mass. App. Ct. 419, 430 (2008). See Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 18 (1st Cir. 1985) (describing as unfair practice under G. L. c. 93A, § 11, "form of extortion" in which one business uses "wedge" to force another business into doing "what otherwise it could not be legally required to do").

One form that commercial extortion takes is the use of breaches of contract, or threatened breaches, as leverage to extract additional benefits not covered by the contract. See Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc., 420 Mass. 39, 43 (1995) (Propac-Mass) (breach of contract "undertaken as leverage" to "destroy" contractual rights of another party has "coercive quality" that makes it unfair under G. L. c. 93A, § 11); Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 226 (1992) ("extortionate quality" of using breach of contract as "lever to obtain advantage" for breaching party makes such conduct unfair under G. L. c. 93A).

We affirm the trial judge's determination that the Dos Anjos LLCs attempted this type of unlawful commercial extortion. Indeed, the LLCs' actions, as found by the trial judge, closely resemble misconduct we found in Anthony's Pier Four, Inc., 411 Mass. at 474-476, to be commercial extortion violative of G. L. c. 93A, § 11. There, the defendant landowner abused its right to approve changes in the plaintiff's development plan, in

breach of contract, to coerce the plaintiff into making financial concessions not required under the contract. Id. at 472-473. Here, the Dos Anjos LLCs abused their right to reject Majestic's site plan -- which the LLCs had in any case waived by failing to timely object -- by providing pretextual and unreasonable grounds for terminating the lease. The LLCs then offered to reinstate the lease on the condition that Majestic agree to concessions outside the lease. These tactics gave the LLCs powerful leverage against Majestic, which was eager to realize its plan to develop a dealership facility on the "Auto Road." The LLCs used this leverage to extort two benefits they had not bargained for under the lease: the Honda exclusivity limitation and the opportunity to buy the Cash land, which had cost Majestic \$800,000, for a mere one dollar.<sup>10</sup> In other words, the Dos Anjos LLCs entered into a lease with Majestic on specific terms and then, once Majestic was committed to its

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<sup>10</sup> Because the Dos Anjos LLCs ultimately decided against reinstating the lease, they did not get to enjoy the concessions they coercively extracted from the plaintiff. This does not, however, prevent us from concluding that the LLCs engaged in commercial extortion, since the unfairness of commercial extortion consists in one business's use of threatened or actual breaches of contract as leverage to pressure another business to grant unwarranted concessions, not merely the subsequent enjoyment of the concessions. Cf. Renovator's Supply, Inc., 72 Mass. App. Ct. at 430 (explaining that c. 93A liability for commercial extortion does not require defendant's coercive effort to succeed in actually extracting benefits from targeted party).

decision to develop and operate its car dealership on the "Auto Road" because of the lease, the LLCs opportunistically used their leverage over Majestic to coercively extract from Majestic additional concessions. This conduct meets the standard for unfair commercial extortion in violation of G. L. c. 93A, § 11.

Another recognized form of commercial extortion is the "stringing along" of a business counterparty. See Full Spectrum Software, Inc. v. Forte Automation Sys., Inc., 858 F.3d 666, 674 (1st Cir. 2017) ("one business's stringing along of another to the other's detriment can satisfy" standard for unfair conduct under G. L. c. 93A, § 11). Stringing along tactics involve the use of a protracted "pattern of conduct . . . calculated to misrepresent the true situation" to the target business and thereby induce detrimental reliance on the target's part. Greenstein v. Flatley, 19 Mass. App. Ct. 351, 356 (1985). With the target's bargaining position weakened by its prolonged reliance on the perpetrator's misrepresentations, the target becomes vulnerable to the coercive pressures which are then applied. See Full Spectrum Software, Inc., supra (describing how defendant had "strung [plaintiff] along" so as to "take advantage of [the plaintiff's] financial exposure" to impose new and adverse contract terms); Peabody Essex Museum, Inc. v. United States Fire Ins. Co., 802 F.3d 39, 54 (1st Cir. 2015) (describing c. 93A misconduct in insurance context as "shifting,

specious defenses" to "string[] out the process" in order to "force" insured into accepting unfavorable settlement); Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 55-56 (1st Cir. 1998) (characterizing defendant's misrepresentation of its intentions in order to "extract a favorable settlement" from plaintiff as "stringing out the process").

Here, during the months-long period between Majestic's initial submission of its site plan and the Dos Anjos LLCs' final confirmation of their decision to terminate the lease, the LLCs continually raised pretextual objections to Majestic's plan, when in fact they had no intention of abiding by the lease because of Dos Anjos's resentment towards Balise for purchasing the Cash land. Even after Majestic accepted the LLCs' extortionate offer to buy the Cash land for one dollar, they still refused to agree definitively to abide by the lease, keeping Majestic guessing at what concessions might finally elicit that agreement. The LLCs used these tactics in aid of a scheme of commercial extortion; in Dos Anjos's own words, he was "fishing for a deal." Given that the Dos Anjos LLCs' conduct comfortably fit the "stringing along" paradigm of commercial extortion, we affirm the trial judge's determination that the LLCs acted unfairly under G. L. c. 93A, § 11, by stringing

Majestic along to obtain benefits not bargained for under the lease.<sup>11</sup>

b. The defendants' liability for multiple damages. Having concluded that the Dos Anjos LLCs' actions surrounding the lease termination constituted unfair conduct in violation of G. L.

c. 93A, § 11, we affirm the trial judge's award of actual damages. Because there is sufficient evidence to establish that the LLCs engaged in this unlawful conduct willfully for purposes of the multiple damages provision in G. L. c. 93A, § 11, we also affirm his decision to award double damages.

Specifically, the trial judge made an express finding that the Dos Anjos LLCs "willfully and knowingly strung along Majestic" as a way to extract undeserved concessions. Indeed, his determination that the LLCs carried out a scheme of commercial extortion is also legally sufficient to establish willful or knowing violations for purposes of the multiple damages provision in G. L. c. 93A, § 11. See Anthony's Pier

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<sup>11</sup> We note that "a breach of contract alone does not amount to an unfair act or practice under G. L. c. 93A, § 2." Propac-Mass, 420 Mass. at 43, citing Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 100-101 (1979). Even an intentional or knowing breach of contract, standing alone, is insufficient for a c. 93A, § 11, violation. See Atkinson, 33 Mass. App. Ct. at 225-226 ("additional factor" beyond even "cheerful[]" breach of contract is required for c. 93A violation). To the extent that the trial judge's decision suggests that an intentional breach alone was enough to constitute an unfair act or practice under G. L. c. 93A, § 11, it was incorrect.

Four, Inc., 411 Mass. at 475 (holding that one business's "knowing use of a pretext" to coerce another business into making extra payments "establishes wilfulness as a matter of law"); Pepsi-Cola Metro. Bottling Co., 754 F.2d at 18 (evidence that defendant engaged in scheme of commercial extortion was sufficient to support determination that defendant was "guilty of a willful violation of [G. L. c. 93A, § 11]").

3. Chapter 93A, § 11, liability for the defendants' conduct after Majestic elected specific performance. We next consider whether the trial judge properly awarded additional delay damages for renewed unfair or deceptive conduct by the defendants, in violation of G. L. c. 93A, § 11, after Majestic chose specific performance of the lease. We also inquire into whether there is sufficient evidence to support the judge's decision to double these actual damages upon a determination that the defendants' unlawful conduct was willful or knowing for purposes of the multiple damages provision in G. L. c. 93A, § 11. As we conclude that the defendants' conduct after Majestic chose specific performance was unfair and deceptive for purposes of G. L. c. 93A, § 11, and this unlawful conduct was done willfully, we affirm the trial judge's decision in this regard as well.

a. The defendants' liability for willfully engaging in deceptive conduct. The case law interpreting G. L. c. 93A

"offer[s] no static definition of the term 'deceptive.'" Aspinall v. Philip Morris Cos., 442 Mass. 381, 394 (2004). Nevertheless, courts have repeatedly affirmed that fraudulent misrepresentation is sufficient to establish deception under G. L. c. 93A, § 11. See McEvoy Travel Bur., Inc. v. Norton Co., 408 Mass. 704, 714 (1990) ("Common law fraud can be the basis for a claim of . . . deceptive practices under [G. L. c. 93A]"); Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 504 (1979) ("A misrepresentation in the common law sense would . . . be the basis for a c. 93A claim").

Under Massachusetts law, a common-law action for fraudulent misrepresentation requires showing that (1) the defendant made a "false representation of a material fact with knowledge of its falsity for the purpose of inducing [the plaintiff] to act thereon"; (2) the plaintiff "relied upon the representation as true and acted upon it to his [or her] detriment"; and (3) such "reliance was reasonable under the circumstances." Rodi v. Southern New England Sch. of Law, 532 F.3d 11, 15 (1st Cir. 2008), cert. denied, 555 U.S. 1175 (2009), citing Masingill v. EMC Corp., 449 Mass. 532, 540 (2007).

Here, there is sufficient evidence in the record to find that the defendants committed fraudulent misrepresentation. From the time the lease was executed in October 2016, through the period when Majestic began enforcing the lease after the

initial c. 93A trial, the defendants repeatedly stated that the Dos Anjos LLCs owned the leased premises, when in fact the property was owned by the Dos Anjos realty trusts. The trial judge found, based on adverse inferences he drew from the witnesses' silence, that the defendants made these false statements about the ownership of the leased premises while knowing of their falsity, and that the defendants thereby "intentionally deceived" Majestic. He also found that Majestic reasonably relied on the defendants' false representations, which were made in the lease as well as in pleadings, affidavits, testimony, and judicial admissions. Due to Majestic's reasonable reliance on the defendants' knowingly false and intentionally deceitful representations, the judge further determined, Majestic suffered damage in the form of months of delay in the permitting process. Because these findings are sufficient to establish fraudulent misrepresentation by the defendants, the trial judge could properly have determined, on the same facts, that the defendants are liable under G. L. c. 93A, § 11, for ongoing deceptive conduct warranting the award of additional delay damages.

Indeed, on these facts, the judge could have concluded that the defendants' deceptive conduct was willful for purposes of the multiple damages provision in G. L. c. 93A, § 11. "Actions involving fraudulent representations in knowing disregard of the

truth" not only constitute c. 93A, § 11, violations, but also amount to "'willful' behavior under the statute." Datacomm Interface, Inc. v. Computerworld Inc., 396 Mass. 760, 780 (1986). See McEvoy Travel Bur., Inc., 408 Mass. at 714 ("an intentional fraud can constitute a basis for the multiplication of damages"). The defendants' intentional deceit regarding the ownership of the leased premises thus suffices to justify the trial judge's award of double damages.

b. The defendants' liability for willfully engaging in unfair conduct. As we already explained, the use of breaches of contract and "stringing along" as tactics of commercial extortion is actionable as unfair conduct under G. L. c. 93A, § 11. Renovator's Supply, Inc., 72 Mass. App. Ct. at 430. Full Spectrum Software, Inc., 858 F.3d at 674. As the trial judge found, the defendants exploited their false warranty of title and resisted resolving the ownership discrepancy to gain leverage over Majestic, which needed the ownership issue settled to proceed with its municipal permitting. The defendants also engaged in "stringing along" tactics by misleading Majestic for months about the actual ownership of the leased premises. The aim of these tactics, the judge found, was to extort from Majestic an adverse modification to the lease terms: an attornment arrangement rather than the LLCs' fee simple ownership of the leased premises, which would allow the

defendants to avoid judgment liens arising from their defaults on the lease. On this record, there is sufficient evidence to support a determination that the defendants, in violation of G. L. c. 93A, § 11, engaged in the unfair practice of commercial extortion.<sup>12</sup>

This evidence also warrants a determination that the defendants' unfair conduct was willful, justifying double damages. As we recognized above, where there is sufficient evidence to demonstrate that a business engaged in commercial extortion violative of G. L. c. 93A, § 11, that evidence also suffices to establish willfulness for purposes of the statute's multiple damages provision. Anthony's Pier Four, Inc., 411 Mass. at 475.

c. Causation of damages. The defendants contend that any renewed c. 93A, § 11, violations began no earlier than May 31, 2019, when Majestic notified the defendants about the title discrepancy. As such, they argue that the trial judge erred by including the period before that date in his calculation of additional delay damages. We disagree.

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<sup>12</sup> We again note that a breach of contract, even if intentional, does not in itself amount to an unfair act or practice under G. L. c. 93A, § 11. See note 11, supra. The trial judge's ruling that the defendants' intentional breaches of the lease alone were enough to constitute unfair conduct for purposes of G. L. c. 93A, § 11, was therefore incorrect.

In a c. 93A, § 11, action to recover damages, a plaintiff business must establish not only that the defendant violated the statute by engaging in an unfair or deceptive act or practice, but also that the plaintiff suffered "a loss of money or property . . . as a result," and that there is "a causal connection between the loss suffered and the defendant's unfair or deceptive method, act, or practice." Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., 469 Mass. 813, 820 (2014). See DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 101 (1983) ("Under c. 93A, the plaintiff is entitled to recover for all losses which were the foreseeable consequences of the defendant's unfair or deceptive act or practice").

If the defendants' renewed unfair and deceptive conduct dated only from May 31, 2019, then Majestic would not be able to establish the requisite causal connection between the defendants' c. 93A, § 11, violations and the losses that Majestic suffered from February to May 2019 due to the delay on its project. However, the defendants are incorrect in claiming that their additional violations traced back no earlier than May 31, 2019. The trial judge found that they intentionally deceived Majestic about the ownership of the leased premises by making a series of false representations; these misrepresentations date back to the lease itself, as well as pleadings, affidavits, testimony, and judicial admissions

connected with the initial c. 93A trial, which took place in 2018.

4. The limitation of liability provision. The final issue we address is whether, as the defendants contend, Majestic may not recover even if the defendants are otherwise liable for the delay damages the trial judge assessed because it is barred from recovery by the limitation of liability provision in the lease. We agree with the trial judge's conclusion that this provision does not preclude recovery by Majestic. However, we reach this conclusion for somewhat different reasons from those articulated by the trial judge, who relied on a distinction developed by the Appeals Court between c. 93A, § 11, violations that are predominantly tort-like and those that resemble simple contract breaches. Because G. L. c. 93A establishes causes of action that blur the distinction between tort and contract claims, incorporating elements of both, we do not adopt this formulation. We focus instead on the particular language of the limitation of liability provision and the different liability standards set out in G. L. c. 93A, § 11, itself.

a. Speculative and consequential damages. The limitation of liability provision in the instant case provided for the waiver of "any speculative or consequential damages caused by [the] Landlord's failure to perform its obligations under [the] Lease." As a threshold matter, we address the meaning of

speculative and consequential damages and their applicability in c. 93A actions. For speculative damages, this is straightforward. The waiver of liability for speculative damages is irrelevant and redundant because speculative damages cannot be recovered in any action, including in a c. 93A action. Kitner v. CTW Transp., Inc., 53 Mass. App. Ct. 741, 748 (2002) (in c. 93A claim, "damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty" [citation omitted]).

Consequential damages can, however, be recovered under G. L. c. 93A. In the context of a c. 93A action, consequential damages encompass "all losses which were the foreseeable consequences of the defendant's unfair or deceptive act or practice." DiMarzo, 389 Mass. at 101. See Auto Flat Car Crushers, Inc., 469 Mass. at 823, quoting Brown v. LeClair, 20 Mass. App. Ct. 976, 979 (1985) ("the 'actual damages' to which a prevailing plaintiff [in a c. 93A, § 11, action] is entitled . . . comprise 'all foreseeable and consequential damages arising out of conduct which violates the statute'")<sup>13</sup> The delay

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<sup>13</sup> This definition of consequential damages aligns with how consequential damages have been understood in the context of actions for breach of contract, namely as "[i]tems of loss other than loss in value of the other party's performance," Restatement (Second) of Contracts § 347 comment c (1981), provided that these losses "arise naturally from the breach" or were "reasonably contemplated by the parties" as consequences of

damages awarded by the trial judge, which were to compensate Majestic for lost profits that were a foreseeable consequence of delays in getting its dealership operational and resulted from the defendants' unfair and deceptive conduct, are thus properly understood to be consequential damages. Cf. Pierce v. Clark, 66 Mass. App. Ct. 912, 914 (2006) (holding that damages to compensate real property purchasers for delay in sale are consequential damages). Accord 24 R. A. Lord, Williston on Contracts § 64:26 (4th ed. 2018) ("Delay damages are consequential damages").

The question then becomes whether the consequential damages Majestic sought to recover were covered by the limitation of liability provision at issue, and if so, whether such a provision was enforceable as a matter of law. We conclude that even if the provision encompassed the conduct at issue, it was unenforceable as a matter of law.

The specific language of the limitation of liability provision restricted Majestic's waiver only to consequential damages "caused by [the] Landlord's failure to perform its obligations under [the] Lease." By its plain terms, the limitation of liability provision did not apply to all consequential damages, but rather covered only consequential

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the breach. Delano Growers' Coop. Winery v. Supreme Wine Co., 393 Mass. 666, 680 (1985).

damages caused by the defendants' failure to perform lease obligations. In this case, the defendants' breaches of the lease included, among others, their termination of the lease based on untimely and unauthorized objections to Majestic's planned development. By its express terms, the limitation of liability provision would preclude consequential damages for such breaches. By contrast, the defendants' c. 93A, § 11, violations stemmed from their fraudulent misrepresentations regarding the ownership status of the leased premises and their extortionate use of pretextual reasons to terminate the lease and of stringing along tactics to obtain additional concessions from Majestic without granting any additional consideration for these concessions. By its terms, the limitation of liability provision did not preclude consequential damages arising from these instances of unfair or deceptive behavior.

That said, we recognize that separating the consequential damages resulting from the defendants' unfair and deceptive conduct from those caused by their "failure to perform . . . obligations under [the] Lease" is difficult because the actions constituting the defendants' breaches of the lease and their violations of G. L. c. 93A, § 11, are intertwined, and the delay damages resulted from both sets of actions.

Nonetheless, as further explained below, to determine whether Majestic may recover, we need not unravel the

interconnected causes of the delay damages it sustained, because we conclude that a limitation of liability provision provides no protection for defendants who willfully or knowingly engage in unfair or deceptive conduct in violation of G. L. c. 93A, § 11.

b. The enforceability of the provision. The primary case in which we have previously addressed the validity of agreements to waive c. 93A, § 11, damages is Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369 (1990) (Canal). In that case, we answered certified questions on whether, in an action by a purchaser of electric generator components for breach of warranty and violation of c. 93A, § 11, the plaintiff was barred from recovery by two limitation of liability clauses in the sale contracts.<sup>14</sup> Id. at 371. We held that the limitation of liability clauses were enforceable in the narrow circumstances presented by the undisputed facts in that case. Id. at 375-376.

In holding specifically that the limitation of liability clauses were effective to bar recovery on the c. 93A, § 11,

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<sup>14</sup> The limitation of liability clauses in Canal were much broader in their language than the limitation of liability provision in the lease here. In that case, the limitation of liability clauses in the sales contracts at issue "specifically excluded indirect, special, incidental, and consequential damages." Canal, 406 Mass. at 371. They also expressly provided that the remedies provided in the contracts were "exclusive" and that neither the seller nor its suppliers would "under any circumstances be liable under any theory of recovery, whether based on contract; on negligence of any kind, strict liability or tort . . . or otherwise. . . ." Id. at 371, 377 n.8.

claim, we explained that "[a] statutory right or remedy may be waived when the waiver would not frustrate the public policies of the statute." Id. at 377. We further explained that the consensual allocation of risk among "commercially sophisticated" parties does not generally raise public policy concerns. Id. at 374. We then observed that in some circumstances, "a c. 93A claim may be merely duplicative of a traditional contract claim," id. at 378, taking as an example our determination in Linthicum v. Archambault, 379 Mass. 381, 387 (1979), that a breach of warranty also establishes a c. 93A, § 11, violation. Canal, supra at 378-379. Where a c. 93A, § 11, claim simply duplicates a claim for breach of contract, we concluded, there is no public policy obstacle to enforcing a waiver of c. 93A liability in the business-to-business context of § 11. Id. at 379.

Drawing on Canal, the Appeals Court developed a test for the enforceability of waivers of liability in c. 93A, § 11, actions. It drew a distinction between c. 93A, § 11, claims that are "founded on a contract theory" and those that are "analogous to a tort-based recovery." Standard Register Co. v. Bolton-Emerson, Inc., 38 Mass. App. Ct. 545, 549 (1995). It concluded that liability disclaimers are enforceable, as Canal instructed, as to c. 93A, § 11, claims that are founded on simple breach of contract. But, as to c. 93A, § 11, claims that

are analogous to tort claims, waivers are unenforceable. Id. at 549-550. Accord Exhibit Source, Inc. v. Wells Ave. Business Ctr., LLC, 94 Mass. App. Ct. 497, 502 (2018).

This court has not, however, adopted the tort versus contract distinction employed by the Appeals Court to determine the enforceability of limitation of liability provisions in c. 93A, § 11, actions. Our cases have also pointed out that a c. 93A claim is difficult to pigeonhole into discrete tort or contract categories, as c. 93A violations tend to involve elements of both tort and breach of contract, blurring the lines between the two. As we explained in Kattar v. Demoulas, 433 Mass. 1, 12 (2000), quoting Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693 (1975), "[t]he relief available under c. 93A is 'sui generis,' being "neither wholly tortious nor wholly contractual in nature." Hence, a "cause of action under c. 93A is 'not dependent on traditional tort or contract law concepts for its definition.'" Kattar, supra at 13, quoting Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 626 (1978).

Our subsequent decisions have also qualified our analysis in Canal of c. 93A, § 11, claims grounded in contract breaches. We have specifically rejected the suggestion, which we first made in Linthicum and then repeated in Canal, that a breach of warranty alone suffices to establish an unfair or deceptive act under G. L. c. 93A in the business-to-business context of § 11.

Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. 737, 743, 745 n.7 (1994). More broadly, we have reiterated that "a breach of contract alone does not amount to an unfair act or practice" for c. 93A, § 11, purposes. Propac-Mass, 420 Mass. at 43. In light of these more recent decisions, the enforceability of waivers of c. 93A, § 11, liability for conduct that involves nothing more than traditional breach of contract is no longer a live question, given that such conduct does not even give rise to a claim under G. L. c. 93A, § 11.

For all these reasons, we conclude that the enforcement of limitation of liability provisions in the context of G. L. c. 93A, § 11, should be refocused on the policies underlying the statute and the distinctions drawn within the statutory scheme, not on the difference between tort and contract. This refocus reflects the fundamental principle that a waiver of statutory rights should not be given effect "where enforcement of the particular waiver would do violence to the public policy underlying the legislative enactment." Spence v. Reeder, 382 Mass. 398, 413 (1981).

We have previously recognized that the Legislature intended to deter and severely punish -- not to condone -- defendants who willfully or knowingly engaged in unfair or deceptive acts. "[T]he multiple damages authorized by G. L. c. 93A 'are essentially punitive in nature.'" Kraft Power Corp. v. Merrill,

464 Mass. 145, 157 (2013), quoting Darviris v. Petros, 442 Mass. 274, 283-284 (2004). See International Fid. Ins. Co. v. Wilson, 387 Mass 841, 856 (1983) (Wilson) ("The multiple damage provisions of c. 93A are designed to impose a penalty"). In providing for multiple damages when defendants willfully or knowingly engage in unfair or deceptive conduct, the Legislature was registering its "displeasure with the proscribed conduct and its desire to deter such conduct" by "encourag[ing] vindicative lawsuits." Id. at 857, quoting McGrath v. Mishara, 386 Mass. 74, 85 (1982). See Haddad v. Gonzalez, 410 Mass. 855, 869 (1991) ("It is established that deterrence is an important goal of the multiple damages provisions of c. 93A").

Because multiple damages under c. 93A "serve the twin 'goals of punishment and deterrence,'" Kraft Power Corp., 464 Mass. at 158, quoting Wilson, 387 Mass at 858, enforcement of a limitation of liability provision that would allow a defendant in a c. 93A, § 11, action to immunize itself in advance from liability for unfair or deceptive conduct that is done willfully or knowingly would do violence to the public policy protected by the statute, see Spence, 382 Mass. at 413. Such willful and

knowing misconduct is not entitled to contractual protection from c. 93A, § 11, liability.<sup>15</sup>

We recognize that G. L. c. 93A, § 11, involves commercial transactions between businesses. In this context, courts recognize that "the market is a rough and tumble place," Buster v. George W. Moore, Inc., 438 Mass. 635, 650 (2003), and generally respect the right of contractual risk allocation among sophisticated commercial parties, even if "we ordinarily would not effectuate a consumer's waiver of rights under [G. L. c. 93A, § 9]." Canal, 406 Mass. at 378. Nevertheless, the Legislature has concluded that, even in the fiercely competitive business-to-business marketplace, there are standards of conduct to be enforced: willful or knowing engagement in unfair or deceptive acts, exemplified by the defendants' extortionate conduct at issue in this case, must be deterred and punished. That legislative determination controls and may not be overridden by private contractual arrangements.<sup>16</sup>

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<sup>15</sup> We have affirmed a similar policy against enforcing exculpatory contractual clauses for intentional and reckless misconduct in the context of tort liability. A contract term "exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy." Sharon v. Newton, 437 Mass. 99, 110 n.12 (2002), quoting Restatement (Second) of Contracts § 195(1) (1981).

<sup>16</sup> Our focus on willful or knowing violations also recognizes that G. L. c. 93A "ties liability for multiple damages to the degree of the defendant's culpability by creating

Applying this standard in the case before us, we conclude that the limitation of liability provision at issue is unenforceable as contrary to public policy. As we discussed above, the record reveals abundant evidence that the defendants' violations of G. L. c. 93A, § 11, were engaged in willfully for purposes of the statute's multiple damages provision. That same evidence amply suffices, under the standard we have defined, to render the lease's limitation of liability provision ineffective to bar Majestic from recovery. The delays in getting Majestic's dealership operational and the lost profits that thereby resulted were the products of the defendants' fraudulent misrepresentations and intentional schemes to string along and take advantage of Majestic. Such "callous and intentional violations" of G. L. c. 93A, § 11, involve a level of culpability that does not only merit multiple damages, Heller, 376 Mass. at 627, but also makes the enforcement of contractual waivers of liability contrary to public policy.

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two classes of defendants." Wilson, 387 Mass. at 853. Those defendants who have committed "relatively innocent violations" of the statute are not liable for multiple damages, while a second class of defendants who have committed "willful or knowing" violations are. Id. Enforcement of limitation of liability provisions for so-called relatively innocent violations of the statute does not raise the same public policy concerns as would enforcement of liability waivers for willful or knowing violations.

Conclusion. The defendants' conduct surrounding their threatened and actual decision to terminate the lease, as well as their conduct after Majestic began to enforce the lease, involved numerous acts prohibited as unfair or deceptive by G. L. c. 93A, § 11. Because these unlawful acts delayed the development and operation of Majestic's planned dealership, the trial judge properly awarded damages to compensate for the resulting lost profits. The defendants' unfair and deceptive conduct was, moreover, engaged in willfully, warranting the award of double damages under the statute's multiple damages provision. Considering the willful character of the defendants' c. 93A, § 11, violations, the limitation of liability provision in the lease is ineffective to preclude Majestic from recovering damages for those violations. For the foregoing reasons, the judgments of the Superior Court are affirmed.<sup>17</sup>

So ordered.

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<sup>17</sup> Majestic has requested an award of appellate attorney's fees and costs in its brief. As the prevailing party on appeal in a c. 93A, § 11, action, Majestic is entitled recover reasonable attorney's fees and costs. See Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 433 (2005); Bonofiglio v. Commercial Union Ins. Co., 412 Mass. 612, 613 (1992). Majestic may file an appropriate application for appellate fees and costs in this court, pursuant to the procedure established by Fabre v. Walton, 441 Mass. 9, 10-11 (2004).